

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS

AIDAN ANDREWS, JORDYN BLAKEY, and
FIREARMS POLICY COALITION, INC.,
Plaintiffs,

v.

STEVEN MCCRAW, *et al.*,
Defendants,

§
§
§
§
§
§
§

Civil Action No. 4:21-cv-1245

**DEFENDANT STEVEN MCCRAW'S
NOTICE OF SUPPLEMENTAL AUTHORITY**

TO THE HONORABLE MARK T. PITTMAN, U.S. DISTRICT JUDGE:

On May 18, 2022, the Fifth Circuit issued an opinion bearing on a disputed issue in the instant cause. Defendant Steven McCraw, in his official capacity as Director of the Texas Department of Public Safety ("McCraw") therefore files this Notice of Supplemental Authority.

The Parties agree the Fifth Circuit applies a two-step Second Amendment analysis. The first step determines whether a challenged provision falls within the scope of the Second Amendment ("First Step"). *Nat'l Rifle Ass'n of America, Inc. v. Bur. of Alcohol, Tobacco, Firearms, and Explosives*, 700 F.3d 185, 194-95 (5th Cir. 2012) ("*BATF*"); *Nat'l Rifle Ass'n of America, Inc. v. McCraw*, 719 F.3d 338, 346-47 (5th Cir. 2013) ("*McCraw I*").¹ The second step applies the appropriate level of means-end scrutiny ("Second Step"). *BATF*, 700 F.3d at 194-95; *McCraw I*, 719 F.3d 346-47.

The Parties disagree about the precedential value of the *BATF* and *McCraw I* First Step analyses. *Cf.* Dkt. 58, pp. 10-11 and Dkt. 64, pp. 2-3. Both *BATF* and *McCraw I* upheld statutory schemes under the First Step analysis, and proceeded to the Second Step, "in an abundance of caution." *BATF*, 700 F.3d at 204; *McCraw I*, 719 F.3d at 347. Plaintiffs contend the *BATF* and *McCraw I* First Step analyses are *dicta*. Dkt. 58, pp. 10-11. McCraw disagrees. Dkt. 64, pp. 2-3.

¹ Plaintiffs refer to *BATF* as "*NR4 I*," and to *McCraw I* as "*McCraw*."

On May 18, 2022, the Fifth Circuit affirmed its adherence to “the rule that alternative holdings are binding precedent and not orbiter dictum.” *Jarkesy v. Sec. and Exch. Comm’n*, No. 20-61008, 2022 WL 1563613, at *8 n.9 (5th Cir. May 18, 2022) (citing *Texas v. United States*, 809 F.3d 134, 178 n. 158 (5th Cir. 2015) (quoting *United States v. Potts*, 644 F.3d 233, 237 n.3 (5th Cir. 2011))).²

McCraw hereby provides notice to the Court of this supplemental authority in support of its argument that the *BAFT* and *McCraw I* First Step analyses are not *dicta*. See Dkt. 62, pp. 2-3; Dkt. 64, pp. 2-3.

Respectfully submitted:

KEN PAXTON
Attorney General of Texas

BRENT WEBSTER
First Assistant Attorney General

GRANT DORFMAN
Deputy First Assistant Attorney General

SHAWN E. COWLES
Deputy Attorney General for Civil Litigation

CHRISTOPHER D. HILTON
Chief, General Litigation Division

/s/ Ryan G. Kercher
RYAN G. KERCHER
Texas Bar No. 24060998
Assistant Attorney General
Office of the Attorney General
P.O. Box 12548, Capitol Station
Austin, Texas 78711-2548
Phone: 512-463-2120
Fax: 512-320-0667
Ryan.Kercher@oag.texas.gov

Counsel for Defendant
Steven McCraw

² Available at <https://www.ca5.uscourts.gov/opinions/pub/20/20-61007-CV0.pdf>, p. 19 (last visited May 20, 2022).

CERTIFICATE OF SERVICE

I hereby certify that on May 23, 2022, a true and correct copy of the foregoing document was served via the Court's CM/ECF system to all counsel of record.

/s/ Ryan G. Kercher
RYAN G. KERCHER